anyone who by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, in order to intimidate such person or any other person or any class of persons from, obtaining or ***providing*** **reproductive health services.**

20. The Defendants have by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with Plaintiffs because Plaintiffs are or have been ***providing*** **reproductive health services.**

21. The Defendants have by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with Plaintiffs in order to intimidate Plaintiffs from ***providing*** **reproductive health services.**

22. The Defendants have by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with Plaintiffs ***because*** **Plaintiffs are or have been *providing* reproductive health services in** Fort Pierce, Florida, and the surrounding communities at and **within the Pregnancy Care Center** of Fort Pierce, 1119 Delaware Avenue, Fort Pierce, Florida, facility, as a part of their reproductive health services provided ***in the***

Pregnancy Care Center of Fort Pierce facility.

23. The Defendants have by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with Plaintiffs **in order to intimidate Plaintiffs from *providing* reproductive health services in** Fort Pierce, Florida, and the surrounding communities at and **within the Pregnancy Care Center** of Fort Pierce, 1119 Delaware Avenue, Fort Pierce, Florida, facility, as a part of their reproductive health services provided ***in the Pregnancy Care Center*** of Fort Pierce facility.

24. The Defendants' actions were taken because Plaintiffs are or have been ***providing* reproductive health services *at and within* the Pregnancy Care Center.**

25. The Defendants' actions were taken in order to intimidate Plaintiffs **from *providing* reproductive health services *at and within* the Pregnancy Care Center.**

26. The Defendants' actions were taken in order to interfere with Plaintiffs' ability ***to provide* reproductive health services at and within the Pregnancy Care Center.**

27. The Defendants' actions were taken in an attempt to intimidate Plaintiffs from ***providing* reproductive health services at and within the Pregnancy Care Center.**

28. The Defendants' actions were taken in an attempt to interfere with Plaintiffs ability ***to***

provide **reproductive health services at and within the Pregnancy Care Center.**

29. The Defendants' force or threat of force or physical obstruction have intimidated Plaintiffs to the point that their actions **have interfered with Plaintiffs' ability to perform their reproductive health services at and within the Pregnancy Care Center** of Fort Pierce.

30. The Defendants' force or threat of force or physical obstruction have interfered with Plaintiffs' ability **to perform their reproductive health services at and within the Pregnancy Care Center** of Fort Pierce.

31. The Defendants' force or threat of force or physical obstruction have attempted to intimidate Plaintiffs to the point that their actions have **interfered with Plaintiffs' ability to perform their reproductive health services at and within the Pregnancy Care Center** of Fort Pierce.

32. The Defendants' force or threat of force or physical obstruction have attempted to interfere with Plaintiffs' ability to perform their reproductive health services **at and within the Pregnancy Care Center** of Fort Pierce.

Petitioners are substantially aggrieved because they properly alleged in a Verified Complaint that the Respondents' actions interfered with Petitioners and intimidated Petitioners. Respondents, and people like them committing harm against peaceful Petitioners, will be issued a free pass by the decisions below. Based upon the decision

below, violent actions such as those asserted in this case will not be afforded any FACE Act protection.

The decision of the United States District Court for the Southern District of Florida was properly appealed to the United States Court of Appeals for the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's opinion "for the reasons set out in the district court's order." (App. 3.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for writ of certiorari should be granted for two principal reasons. First, the Court of Appeals' decision flatly conflicts with decisions of other Courts of Appeals creating uncertainty in the consistent application of the FACE Act throughout the country. Second, the Court of Appeals' decision rips from the FACE Act Congress' intent by holding that the FACE Act only protects people after they are inside a facility.

I. Conflicts with other Circuits creating uncertainty in the consistent application of the FACE Act throughout the country.

In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (*en banc*), *cert. denied*, 539 U.S. 958 (2003), the United States Court of Appeals for the Ninth Circuit held that public dissemination of posters violated the FACE Act. The Ninth Circuit reasoned that the posters should be considered to be "threats of force" in violation of the FACE Act, reasoning that the defendants had made

statements to intimidate. Petitioners' Verified Complaint alleges that the Respondents' "threat of force or physical obstruction have attempted to intimidate Plaintiffs to the point that their actions have **interfered with Plaintiffs' ability to perform their reproductive health services at and within the Pregnancy Care Center** of Fort Pierce." Based upon the threats of force made to intimidate the plaintiffs, the Ninth Circuit upheld the district court's permanent injunction restraining the defendants from threatening any of the plaintiffs in violation of the FACE Act.

The decision of the Court of Appeals in this case flatly conflicts with the decision of the Ninth Circuit. The Ninth Circuit applied the FACE Act to threats of force under facts similar to this case. The threats of force in this case are even more menacing because they were made directly to the Petitioners. The Respondents confronted the Petitioners and made threats of force with the immediate ability to carry them out. In contrast, the Ninth Circuit's facts related to posters, not direct confrontational threats of force.

In this case, Petitioners were not allowed to prove the facts supporting the threats of force because the case was dismissed for failure to state a claim under the FACE Act. The lower courts did not hold that Petitioners' Verified Complaint failed to allege a violation of the FACE Act in the text. The text of Petitioners' Verified Complaint clearly alleges, *inter alia*, that the Respondents' "threat of force or physical obstruction have attempted to intimidate Plaintiffs to the point that their actions have **interfered with Plaintiffs' ability to perform their reproductive health services at and within the Pregnancy Care Center** of Fort Pierce." The lower courts reasoned that the

FACE Act did not protect Petitioners because they "were not providing the counseling services in the Pregnancy Care Center or any other facility at the time of the defendants alleged wrongful conduct." (App. 12.)

The reasoning in this case creates a judicially crafted requirement that a person be located inside a facility at the time the threats of force occur. This case directly conflicts with the holding of the Ninth Circuit and creates uncertainty in the proper application of the FACE Act.

In *U.S. v. Hart*, 212 F.3d 1067 (8th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001), the Eighth Circuit held that the FACE Act was violated when a person parked a Ryder truck outside a facility. The Eighth Circuit reasoned that the Ryder truck was a threat of force in violation of the FACE Act because a Ryder truck had been used in Oklahoma.

In *U.S. v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996), the Eighth Circuit held that the FACE Act was violated outside a facility when a person spoke threats of force to various individuals. In *Dinwiddie*, the Eighth Circuit explained the terms "facility" and "provide" under the FACE Act.

> The phrase "facility [that] provides reproductive health services" refers to a type of building. See 18 U.S.C. § 248(e)(1). Buildings do not perform abortions or counsel pregnant women. The word "provide" must, then, have a broader meaning than Mrs. Dinwiddie has suggested. A building that houses an abortion clinic "provides" reproductive-health services because it is an integral part of a business in which abortions are performed and pregnant women are counselled. The same logic applies to workers at an abortion clinic – Dr.

> Crist could not do his job without either Planned Parenthood's "facility" or its workers.

Id. 928-27.

Following such reasoning, the Eighth Circuit held that Dinwiddie had also violated the FACE Act when she assaulted a maintenance worker outside the facility.

In *U.S. v. Bird*, 124 F.3d 667 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998), the Fifth Circuit applied the FACE Act in convicting a person for making threats and breaking the windshield on a car as a person was driving up to a facility entrance.

In *U.S. v. Scott*, 958 F. Supp. 761 (D. Conn. 1997), the court applied the FACE Act to protect escorts who never entered inside a facility. The court found that "The escorts' sole purpose is to ensure safe access to and exit from Summit by the clinic's doctors, staff, patients, and people who accompany them." *Id.* at 766. As in *Scott*, in *U.S. v. Hill*, 893 F. Supp. 1034 (N.D. Fla. 1994), the court applied the FACE Act to protect escorts outside a facility. The courts in *Scott* and *Hill* held that the FACE Act applied to actions or threats of force while the plaintiffs were outside the facility.

In *U.S. v. MacMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995), MacMillian made statements to various people outside a facility. The court held that MacMillan's statements were threats of force in violation of the FACE Act. The court then entered an injunction prohibiting MacMillan from "using threats of force" or "engaging in any conduct volatile of FACE *anywhere*." *Id.* (emphasis supplied).

In *U.S. v. White*, 893 F. Supp. 1423 (C.D. Calif. 1995), the defendants protested near the plaintiff's *residence*, not anywhere near the facility. None of the facts in *White* related to any activity inside any facility and the injunction prohibited contact with the family members of the plaintiff who were not even remotely related to the facility. The court entered an injunction pursuant to FACE enjoining defendants from conduct *away from the facility and with no geographical boundary*. The defendants were prohibited from:

> a. Using force or threats of force to interfere with or intimidate Dr. Michael Morris or his wife, Sarah Morris, in violation of the FACE statute;
>
> b. Telephoning Dr. Michael Morris or Sarah Morris or entering their property on Dart Canyon Road;
>
> c. Coming physically closer than 15 feet to Dr. Michael Morris' physical person or Sarah Morris' physical person, or coming closer than 15 feet to the edge of Dart Canyon Road as Dr. Morris or Sarah Morris passes in a vehicle;
>
> d. Driving or placing a vehicle closer than 3 car lengths in front of or behind Dr. Michael Morris' vehicle or Sarah Morris' vehicle;
>
> e. Placing placards or signs on or within 5 feet of Dr. Michael Morris' vehicle or Sarah Morris' vehicle;
>
> f. Physically touching Dr. Michael Morris, Dr. Michael Morris' vehicle, Sarah Morris or Sarah Morris' vehicle; and
>
> g. Demonstrating, congregating, or picketing within 45 feet in any direction from the seam of

> the intersection where Dart Canyon Road meets the Morris private driveway in Cresting, California.

Id., at 1439.

As in *White*, in *U.S. v. Lindgren*, 883 F. Supp. 1321 (D. N.D. 1995), the defendant had protested at residences, not a facility. The court entered an injunction ordering the defendant to "at all times keep at least 100 feet away from . . . (B) Jane F. Bovard, George M. Miks, Delene Carol, Peggy Jo Estenson, and all other individuals employed by the Fargo Women's Health Organization. . . ." *Id.*, at 1334.

In *Greenhut v. Hand*, 996 F. Supp. 372 (D. N.J. 1998), the FACE Act was applied to prohibit threatening phone calls made from the defendant's home to the plaintiff's home. The court applied the FACE Act to prohibit the threats made from the defendant's residence to the plaintiff's residence – away from the facility. *Id.*, at 374, n.1. The threats made in *Greenhut* consisted of statements made because the plaintiff provided reproductive health services outside of abortion clinics – away from any facility.

The District Court erred in dismissing Petitioners' Verified Complaint based upon the factual conclusion that although the allegations are stated in the Verified Complaint, they fail to state a claim under the FACE Act because Petitioners were not inside their own facility "at the time of the defendants alleged wrongful conduct." (App. 12.) Perhaps the allegations should have read as follows:

> On February 19, 2000, Plaintiff Dr. Smith was exiting her car when the driver of a nearby car, Defendant Mr. Jones, then aimed his car directly

at Plaintiff Dr. Smith and drove the vehicle toward Plaintiff Dr. Smith.

Plaintiff Dr. Smith was forced to jump out of the way of the vehicle to avoid being hit.

Defendant Jones' actions were taken because Plaintiff Dr. Smith is or has been providing reproductive health services at and within the Pregnancy Care Center.

Defendant Jones' actions were taken in order to intimidate Plaintiff Dr. Smith from providing reproductive health services at and within the Pregnancy Care Center.

Defendant Jones' actions were taken in order to interfere with Plaintiff Dr. Smith's ability to provide reproductive health services at and within the Pregnancy Care Center.

Defendant Jones' actions were taken in an attempt to intimidate Plaintiff Dr. Smith from providing reproductive health services at and within the Pregnancy Care Center.

Defendant Jones' actions were taken in an attempt to interfere with Plaintiff Dr. Smith's ability to provide reproductive health services at and within the Pregnancy Care Center.

Defendant Jones' force or threat of force or physical obstruction have intimidated Plaintiff Dr. Smith to the point that his actions have interfered with Plaintiff Dr. Smith's ability to perform her reproductive health services at and within the Pregnancy Care Center of Fort Pierce.

Defendant Jones' force or threat of force or physical obstruction has interfered with Plaintiff Dr. Smith's ability to perform her reproductive

> health services at and within the Pregnancy Care Center of Fort Pierce.
>
> Defendant Jones' force or threat of force or physical obstruction have attempted to intimidate Plaintiff Dr. Smith to the point that his actions have interfered with Plaintiff Dr. Smith's ability to perform her reproductive health services at and within the Pregnancy Care Center of Fort Pierce.
>
> Defendant Jones' force or threat of force or physical obstruction has attempted to interfere with Plaintiff Dr. Smith's ability to perform her reproductive health services at and within the Pregnancy Care Center of Fort Pierce.

Under the District Court's analysis, the facts above do not allege a FACE Act violation because the attempt to run down Dr. Smith happened outside a facility. These same allegations are in Petitioners' Verified Complaint by only replacing Dr. Smith with Petitioner Lotierzo.

The District Court errantly relied on *Raney v. Aware Woman Center for Choice, Inc.*, 224 F.3d 1266 (11th Cir. 2000), to hold that the Petitioners are not entitled to protection under the FACE Act. However, Mr. Raney never even alleged that he was offering reproductive health services in connection with a facility that provides abortion alternatives. Rather, Mr. Raney attempted to associate himself with the very abortion facility providing the type of reproductive health services he was protesting against. In contrast with Petitioners' case, Mr. Raney did not even allege in his complaint that he was offering reproductive health services in connection with a facility other than the abortion clinic he was protesting against.

Although Petitioners provided the above discussion to the lower courts, neither the District Court nor the Court of Appeals referenced any of Petitioners' cases. If the Court of Appeals had followed the other Circuits, Petitioners would not be required to be inside their own facility "at the time of the defendants alleged wrongful conduct." (App. 12.) In every other case across this country, the FACE Act is not limited to protect people only after they are inside the facility. Courts have consistently offered the protection of the FACE Act when the conduct is far removed from the actual facility – at residences – and when no services were being provided.

II. Conflicts with Congress' intent in enacting the FACE Act.

In all other FACE Act cases, the FACE Act was applied to prohibit particular actions which took place outside of the four walls of a facility. To hold the FACE Act operates only to protect people after they enter a facility rips from the statute the protection Congress intended – to protect people going into and out of a facility. The Court of Appeals has turned the FACE Act on its head because once a person is already inside a facility no "Freedom of Access" is needed. In direct contrast with the holding below, the FACE Act was intended only to apply while a person is outside a facility. Petitioners are merely seeking the protection offered to them under the FACE Act. Petitioners should, at a minimum, be allowed to conduct discovery to prove their Verified Complaint.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15009
Non-Argument Calendar

D.C. Docket No. 03-14294-CV-DLG

THOMAS J. EUTENEUER,
ANNE C. LOTIERZO,

Plaintiffs-Appellants,

versus

ARNOLD GUERRERO,
CARLITO ARROGANTE,
SCOTT LAPOLLA,
JILL CIELO,
JANE DOES, I-II,
COLLEEN CARR,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed July 28, 2005)

Before BLACK, CARNES and PRYOR, Circuit Judges.

PER CURIAM:

On July 19, 2000, Thomas Euteneuer and Anne Lotierzo filed a complaint against Arnold Guerrero, Carlito Arrogante and others under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. On February 26, 2001, the district court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. The court gave the plaintiffs fourteen days to file an amended complaint, which they declined to do. On March 26, 2001 after the fourteen day period had elapsed, the district court entered an order of dismissal. The plaintiffs then filed a notice of appeal of the district court's order of February 26. On January 7, 2002, this Court affirmed the district court's dismissal of the complaint as to Arnold Guerrero and Carlito Arrogante.

Two years after this Court's ruling, the plaintiffs filed another complaint against Arnold Guerrero, Carlito Arrogante, Scott Lapolla, Jill Cielo, Jane doe I, and Jane Doe II asserting the same claims under the FACE Act as well as state claims for assault and battery. The district court concluded that the plaintiffs' present lawsuit against Guerrero and Arrogante was barred due to res judicata and dismissed the complaint against those two defendants. Upon review, we affirm that decision for the reasons set out in the district court's order.

As to the other defendants, the district court concluded that the plaintiffs had failed to state a claim under the FACE Act and dismissed the complaint. The claims that the plaintiffs now assert against the new defendants are the same claims that were dismissed against Guerrero and Arrogante, pursuant to Fed. R. Civ. P. 12(b)(6), in the plaintiffs' previous lawsuit. After reviewing the record and

the pleadings, we conclude that the district court was correct to dismiss these same claims against the new defendants. We affirm the district court's dismissal of the complaint against the remaining defendants for the reasons set out in the district court's order.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 03-14294-CIV-GRAHAM

THOMAS J. EUTENEUER
and ANNE C. LOTIERZO,

Plaintiffs,

vs.

ARNOLD GUERRERO;
CARLITO ARROGANTE;
SCOTT LAPOLLA; JILL
CIELO and JANE DOES I-II,

Defendants. /

ORDER

(Filed Aug. 31, 2004)

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss (D.E. 11).

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise duly advised in the premises.

On July 19, 2000, Plaintiffs, Thomas J. Euteneuer and Anne C. Lotierzo, filed a complaint against Arnold Guerrero, Carlito Arrogante and others under the Freedom of Access to Clinic Entrances Act ("FACE" Act"), 18 U.S.C. § 248, seeking to enjoin defendants from interfering with plaintiffs' reproductive counseling services. Guerrero and Arrogante moved to dismiss the plaintiffs' complaint for failure to state a claim. On February 26, 2001, the district court granted the defendants'

motions to dismiss for failure to state a claim upon which relief could be granted. The court gave the plaintiffs fourteen (14) days, from the February 26, 2001, Order, to file an amended complaint. The plaintiffs amended their complaint. On March 26, 2001, after the fourteen-day period had elapsed, the district court entered an order of dismissal and closed the case. The plaintiffs then filed a notice of appeal of the district court's February 26, 2001, Order to the Eleventh Circuit Court of Appeals. On January 7, 2002, the Eleventh Circuit issued an opinion affirming the district court's dismissal of the complaint.[1]

Almost two years after the Eleventh Circuit's ruling, plaintiffs filed a complaint against Guerrero, Arrogante, Scott Lapolla, Jill Cielo and Jane Does I-II asserting similar claims under the FACE Act as well as claims for battery and assault. Guerrero and Arrogante have moved to dismiss the complaint based on the doctrine of res judicata or alternatively for failure to state a claim. Their res judicata defense is predicated on the previously dismissed lawsuit and the plaintiffs' failure to timely amend the complaint. For the reasons stated below, the Court concludes that the claims filed against Guerrero and Arrogante are barred by res judicata, and that the plaintiffs have failed to state a federal claim under the FACE Act against the remaining defendants.

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[1] The Eleventh Circuit reversed the district court's order and remanded the action with respect to another defendant not named in this lawsuit.

II. STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiff give notice of his claim by including in the complaint a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed.R.Civ.Proc. (8)(a)(2); *Swierkiewicz v. Soreman, N.A.*, 534 U.S. 506, 512 (2002). Thus, a complaint shall not be dismissed for "failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling on a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff and accept its allegations as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Beck v. Deloitte & Touche*, 144 F.3d 732 (11th Cir. 1998). Thus in the context of a motion to dismiss, the issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims," as pled. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. DISCUSSION

A. Claims Against Arrogante & Guerrero

Arrogante and Guerrero argue that the claims filed against them are barred by the doctrine of res judicata. The doctrine of res judicata, or claim preclusion, will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same. *Davila v. Delta Airlines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003). This bar pertains not only to claims

that were raised in the prior action, but also to all claims that could have been raised previously. *See id.*; *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1271 (11th Cir. 2002). In determining whether the prior and present causes of actions are the same, the court must decide whether the actions arise "out of the same nucleus of operative fact, or are based upon the same factual predicate." *Davila*, 326 F.3d at 1187 (internal citations omitted).

Plaintiffs do not contest that the FACE Act and battery claims against Guerrero and Arrogante arise out of the same factual predicate as their previously dismissed claims. They instead argue that they are not precluded from bringing their claims again because the district court's dismissal in February 26, 2001, was not on the merits, and the Eleventh Circuit "merely held that the language of the allegations did not create claim." A court's dismissal of a complaint without prejudice is an "implicit invitation to amplify the complaint: and a plaintiff's decision to appeal the order rather than amend during the time allowed for amendment, is a waiver of the right to later amend the complaint. *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442, 444-445 (11th Cir. 1986) (internal quotation omitted). The dismissal order becomes a final judgment at the end of the stated period for amendment. *Id.* at 445; *see also Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1132-33 (11th Cir. 1994). Once final, the judgment becomes res judicata both as to the claim alleged and any other claim that might have been asserted in the case. *See Daigle v. Opelousas Health Care, Inc.* 774 F.2d 1344, 134 (5th Cir. 1985); *see also Diaz v. Moore*, 861 F.Supp. 1041, 1048 (N.D.Fla. 1994).

The court's February 26, 2001, Order allowed plaintiffs to amend their complaint within fourteen days from the date of the Order. The plaintiffs, however, waived their right to amend when they chose to appeal the Order rather than amend during the fourteen-day period allowed for amendment. On March 26, 2001, after the fourteen-day period had elapsed, the district court entered an order of dismissal and closed the case. At that point, the Court's February 26, 2001, Order became a final order on the merits that was affirmed on appeal. The Order, being final, became res judicata as to the instant claims alleged against Guerrero and Arrogante and any other claims that might have been asserted in that case. Accordingly, the Court concludes that the claims against Guerrero and Arrogante must be dismissed.

B. Claims Against the Remaining Defendants

It is argued that the claims under the FACE Act must be dismissed because plaintiffs have failed to state a claim for relief. The FACE Act provides civil penalties against anyone who:

> by force or threat or force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1).

To state a claim for relief under the FACE Act, a plaintiff must allege: (1) force, threat of force, or physical

obstruction; (2) done with the intent to; (3) injure, intimidate, or interfere with a person or attempt to do so; (4) because that person has sought or provided, or is seeking or providing, or will seek or provide, reproductive health services. *See Lotierzo v. A Woman's World*, 278 F.3d 1180, 1182 (11th Cir. 2002). The plaintiffs in this case sufficiently allege elements one, two and three, but they have not alleged the fourth: that the defendants' actions were taken because plaintiffs have provided, are providing or will provide, reproductive health services.

The Eleventh Circuit has made clear that the fourth element of a FACE Act claim requires allegations of facts tending to prove that the reproductive health services at issue were being performed or sought to be performed *in a facility*. *See Raney v. Aware Woman Center for Choice, Inc.*, 224 F.3d 1266, 1268 (11th Cir. 2000). In *Raney*, the plaintiff, who had been arrested for violating an injunction, brought a FACE Act action alleging that police officers had prevented him from providing counseling services to women and men as they were entering and leaving an abortion clinic. The district court, after concluding that the plaintiff could not establish a factual basis for his claim, dismissed the complaint and denied plaintiff's motion to amend the judgment. The Eleventh Circuit explained that to properly bring a FACE Act claim, the plaintiff must be able to allege that he was providing the counseling services in a facility. Because at the time of his arrest the plaintiff was standing in the sidewalk, the Court concluded that the plaintiff could not claim that he was in a facility nor that he was offering the type of reproductive health services to which the FACE Act protects access. *Id.* at 1269.

Subsequent to the *Raney* case, the plaintiffs in this case also attempted to bring a claim under the FACE Act to enjoin the employees, patients and escorts of an abortion clinic from interfering with their attempts to provide reproductive health counseling services. *See Lotierzo v. A Woman's World Medical Center*, 278 F.3d 1180 (11th Cir. 2002). The district court dismissed plaintiffs' action concluding, *inter alia*, that because plaintiffs were standing outside an abortion clinic, rather than in their health counseling facility, plaintiffs had failed to allege that defendants had actually interfered with defendants' ability to provide counseling services in a facility. The Eleventh Circuit affirmed the district court's dismissal, noting that: "The FACE Act protects individuals who provide reproductive health services *in a facility*. With only one exception, all of Appellants' allegations arose because Appellants were providing referral counseling *outside* of a Woman's World Medical Center." *Id.* at 1182 (emphasis added). The Court further noted that the plaintiffs in *Lotierzo* "merely were concerned with their ability to provided reproductive health referral counseling outside of the Pregnancy Care Center and on the sidewalks in front of a Woman's World Medical Center." *Id.* at 1183. The Eleventh Circuit, however, reversed the dismissal as to one defendant who had actually visited the plaintiff's facility to threaten and intimidate him. *Id.*

The complaint in this case suffers from the same defects as the complaint in *Lotierzo*. The plaintiffs artfully allege that:

> The Defendants have by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with Plaintiffs because

> Plaintiffs are or have been providing reproductive health services in Fort Pierce, Florida, and the surrounding communities at and within the Pregnancy Care Center of Fort Pierce, 1119 Delaware Avenue, Fort Pierce, Florida, facility, as a part of their reproductive health services provided in the Pregnancy Care Center of Fort Pierce facility.
>
> * * *
>
> The Defendants' actions were taken because Plaintiffs are or have been providing reproductive health services at and within the Pregnancy Care center.

Complaint at ¶¶ 24, 26.

But the underlying facts supporting these allegations actually reveal that none of the acts giving rise to the FACE Act claims against defendants occurred in a facility or because anyone sought to obtain services in a facility. *See* Complaint at ¶¶ 123-173. For example, plaintiff, Euteneuer, alleges that defendant Lapolla threatened to inflict bodily harm upon him because Euteneuer approached Lapolla's girlfriend as she exited her vehicle and tried to give her information concerning abortion alternatives. *See* Complaint at ¶¶ 122-125. Similarly, plaintiff Lotierzo alleges that Jane DOES I and II threatened to physically harm her while defendants were driving their vehicle in the street *See* Complaint at ¶ 156-171.

In ruling on a motion to dismiss, the court "need not accept claims that are internally inconsistent . . . conclusory allegations, unwarranted deductions or mere legal conclusions asserted by a party." *Campos v. Immigration and Naturalization*, 32 F.Supp. 2d 1337, 1343 (S.D.Fla. 1998); *Ellen S. v. the Florida Bd. of Bar Examiners*, 859

F.Supp. 1489, 1492 (S.D. Fla. 1994). In this case, plaintiffs' conclusory allegations that defendants' actions were taken "because Plaintiffs are or have been providing reproductive health services at and within the Pregnancy Care Center" are contradicted by the facts showing that plaintiffs were not providing the counseling services in the Pregnancy Care center or any other facility at the time of the defendants' alleged wrongful conduct. Moreover, the complaint contains no facts tending to show that defendants directed their actions to anyone seeking to obtain counseling services in the Pregnancy Health Center or in any other facility related to plaintiffs. As Eleventh Circuit precedent has demonstrated in *Lotierzo* and *Raney*, in order to bring a FACE Act claim, the plaintiffs must be able to allege facts from which the Court can infer a nexus between defendants' actions and plaintiffs' reproductive health services. Such a nexus cannot be satisfied when, as is the case here, the facts alleged show that the plaintiffs were attempting to provide reproductive health services outside someone else's facility or on the sidewalk. *See Lotierzo*, 278 F.3d at 1183; *Raney*, 224 F.3d at 1269. Accordingly, the Court concludes that dismissal of plaintiffs' FACE Act claims against defendants is appropriate for failure to state a claim for relief.

Count III of Plaintiffs' complaint alleges state law claims for assault against defendants Lapolla, Jill Cielo and Jane Does I and II. When all the federal claims have been eliminated before trial, the district court should dismiss the case, unless factors point strongly towards acceptance of supplemental jurisdiction over any remaining state law claim. *See Cornegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-51 (1988); *Mousa v. Lauda Air Luftfahrt*, 258 F.Supp. 2d 1329, 1347 (S.D.Fla. 2003). The

Court, finding no such factor present in this case, exercises its discretion and declines to exert supplemental jurisdiction over the state law claims in Count III of the complaint.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion to Dismiss (D.E. 11) is hereby **GRANTED**. The complaint of this matter is hereby dismissed with prejudice as to defendants Guerrero and Arrogante. The complaint is dismissed without prejudice as to the remaining defendants. The plaintiffs have fourteen (14) days from the date of this Order within which to amend their complaint to state a cause of action under the FACE Act.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of August, 2004.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record